travelling from the direction of Kuantan and the lorry was coming from the opposite direction. After the collision the deceased, his motorcycle, traces of blood and brains, etc. were found in the motorcyclist's side of the road either on the road or on the grass-verge. But his skull was found in the lorry's half of the road where the lorry was found parked. Some blood stains were found on the rear offside wall of the lorry. Most of these are shown in the sketch plan.

The positions of the two vehicles as shown in the sketch plan provide little or no assistance in ascertaining whether or not the collision occurred in the deceased's half of the road. The appellant's case on liability turned almost entirely on this question. She relied on the evidence of her only witness, PW1, who claimed to have seen what happened shortly before the collision. He said:

"As the Vespa was negotiating the left-hand bend, it went to the centre of the road (now says) near the centre of the road — and all of a sudden I saw a motor lorry coming from opposite direction. The lorry encroached into our side of the road. Both the scooter and lorry tried to avoid collision — by swerving to its own left side — but could not make it and there was a collision."

According to him the deceased was about 1 to 2 ft from the centre line on his own side of the road and the lorry was in the wrong half of the road, some 4 feet from the centre line. If his evidence had been accepted by the learned trial judge, I have no doubt that there would have been a finding of negligence against the lorry driver. But it was not. This is clear from the following passage of the judgment:

"Having given this matter very anxious thought, I regret to have to conclude that it is more probable than not that the collision took place on the lorry's side of the road. I say so mainly because of what PW1 told the police about 5½ hours after the accident. So soon after the tragedy when the question of compensating the deceased's widow had not probably occurred to him he said quite voluntarily to Inspector Ramalingam that the Vespa as it was negotiating the bend went into the centre of the road, that it might even have passed into the other side of the road, that he did not notice whether the lorry was going fast or slow, that he saw the deceased hitting into the rear right side of the lorry and that after hitting into the lorry the Vespa came back to its correct side of the road where it fell on the left side of the road as one faced Bentong. I am also influenced by the fact that when giving evidence PW1 first said in examination-in-chief that as the deceased was negotiating the bend he went to the centre of the road, but immediately thereafter corrected himself and said that the deceased went near the centre of the road. The fact that he at first said that the deceased went to the centre of the road at once made me wary of his evidence."

Here lies the difficulty in this appeal. The learned trial judge had seen and heard the witness and was not satisfied with his evidence. He gave his reason for not being so satisfied. Speaking for myself I must say I cannot quarrel with this reason. Indeed, I do not think I should. In the event there is only the sketch plan to consider. The learned trial judge has considered it too and apparently was unable to draw any inference of negligence against the lorry driver. The fact that the deceased and his motorcycle were found in his own half of the road can, of course, suggest the possibility that the lorry had encroached into the wrong side of the road. But it is no more than a possibility. But bearing in mind the fact that the motorcycle was the lighter of the two vehicles and the admission by the appellant's witness that the deceased was travelling at about 40 miles per hour, it is also reasonable to assume that the collision might have occurred on his wrong side of the road and the force of the impact had thrown him and his motorcycle some considerable distance to his left leaving the various traces I have mentioned earlier. The fact that he was taking a lefthand bend strongly supports this assumption. Furthermore, the finding of the skull in the lorry's side of the road also suggests the likelihood of the collision occurring in the deceased's wrong half of the road. Finally, there was the testimony of the lorry driver which, apparently, was accepted by the learned trial judge.

Accordingly, I would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar.*

THEVANNASAN & ANOR. v. PANG CHEONG YOW & ORS.

[F.C. (Ong C.J., Gill and Ali F.JJ.) March 14, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 80 of 1972]

Negligence — Lorry parked on correct side of highway with lights on — Another lorry crashing into stationary lorry from behind — Whether driver of stationary lorry negligent.

The second appellant's lorry was parked on its own side of the road with its lights on 4¼ miles before Bentong. Another lorry carrying the first respondent crashed into the stationary lorry from behind. The first respondent suffered injury and subsequently claimed damages against the drivers and owners of both vehicles, alleging negligence on the part of the drivers of one or the other or both of them. The learned trial judge found that the driver of the stationary lorry was 75% to blame for the accident and the driver of the other lorry 25% to blame for the accident and he apportioned damages accordingly. Both the appellants and the third respondent appealed and cross-appealed against the trial court's findings on liability and apportionment.

Held, allowing the appeal (Ong C.J. dissenting): the first appellant, the driver of the stationary lorry, could not in the circumstances be said to have failed in his common law duty to take care. He had parked his lorry with its rear lights on and in such a manner as to leave enough space for vehicles coming from the rear to pass through safely. The first appellant therefore cannot be held guilty of negligence and the accident was therefore caused solely by the negligence of the driver of the lorry, which crashed into the back of the stationary lorry.

Cases referred to:-

(1) *Brophy* v. *Shaw, Times* June 25, 1965; [1965] C.L.Y. 2677; [1969] 1 M.L.J. 49, 52.

(2) *Edwards* v. *Nobbs* (1963) Bingham's All the Modern Cases on Negligence, 1 Supplement; [1969] 1 M.L.J. 49, 52.

(3) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376.

(4) *Sepang Omnibus Sdn. Bhd.* v. *Christina Loh Soo Pang* [1970] 2 M.L.J. 234, 236.

(5) *Bolton & Ors.* v. *Stone* [1951] 1 All E.R. 1078, 1082.

(6) *Chan Loo Khee* v. *Lai Siew Soon & Ors.* [1971] 1 M.L.J. 253.

(7) *Kelly* v. *W.R.N. Contracting Ltd. & Anor. (Burke, Third Party)* [1968] 1 W.L.R. 921.

(8) *Coote & Anor.* v. *Stone* [1971] 1 W.L.R. 279.

FEDERAL COURT.

Ranjit Singh Sodhy for appellants.

David Tay for first respondent.

Chooi Mun Soh for third respondent.

Ong C.J.: At about 3 a.m. on a misty night the second appellant's lorry was parked on its own side of the road 4¾ miles before Bentong when another lorry, carrying the first respondent as an attendant, crashed into the stationary vehicle from behind. The first respondent suffered serious injury, requiring amputation of his left leg above the knee. He subsequently claimed damages against the drivers and owners of both vehicles, alleging negligence on the part of the drivers of one or the other or both of them.

The action came on for trial in the High Court at Raub almost 3½ years after the event. The learned trial judge found as a fact that the primary cause of the accident was because the stationary lorry had been parked 30 feet from the exit of a blind left hand bend. On that account he held the first appellant 75% to blame and apportioned 25% of blame to the other driver for driving round a blind corner at 35 miles per hour — which the judge thought a bit fast because of the mist around at the time. Against such decision the appellants and third respondent have both appealed — each on the ground that the other side was wholly to blame.

During the long interval between the accident and trial the attendant of the stationary lorry and the driver of the other had sought employment elsewhere and could not be traced. In the event the only eye-witnesses called were the plaintiff (first respondent) and Thevannasan, the Tamil driver of the stationary lorry. The evidence they gave was naturally in direct conflict. The judge reserved his decision and it is clear beyond doubt, from a close perusal of his judgment, that he had given all available evidence and arguments his most careful consideration to ascertain the effective cause of the accident.

This primary issue was a pure question of fact. The plaintiff, to quote the judge, "was adamant that the collision occurred because the stationary lorry had parked too close to the bend. The first defendant denies this". One of them must, in this case, have been telling the truth and the other a pack of lies. The judge believed the plaintiff. He had had the advantage, denied to us, of seeing and hearing the witness on each side. Having to decide on their credibility, he made his election and consequent finding of fact. Such a finding should not, in my opinion, be lightly disturbed by us in the absence of cogent evidence shewing that he was demonstrably in error.

An appeal to this court is by way of rehearing: (see section 69 of the Courts of Judicature Act). Adopting this approach, I too have independently reached the same conclusion as the learned trial judge. In my view the conclusion is irresistible that the accident occurred purely because the first defendant had parked the stationary lorry some 30 feet from the exit of a blind left hand bend. I would reject as wholly implausible the evidence of Thevannasan that his lorry was parked as must as 4 or 5 chains *after* the bend. If that allegation were true, the plaintiff's driver, notwithstanding that he must have had the stationary lorry in full view for a considerable distance, still rammed into it. Such a proposition necessarily postulates that the plaintiff's driver must have been driving with unseeing eyes, which is absurd. He had been travelling along a winding road for miles requiring constant alertness — not miles of a long straight stretch which might have induced drowsiness. Hence, speaking for myself, *I cannot believe that he could have failed to see the huge vehicle ahead, unless it was concealed by the blind bend.* The plaintiff had no grounds for bias since he was in any event bound to recover damages whether one or both drivers should be found negligent. I should here observe that the learned judge had duly taken note of the suggestion that the plaintiff's driver might probably have been overcome by drowsiness. But he had considered and rejected it. He had also carefully considered the plea of guilty made by the plaintiff's driver to a charge of dangerous driving, as well as counsel's comments on the sketch plan which, so far as it went, showed no bend, but, as the judge said, in all the circumstances, such evidence should properly be regarded as neutral, and I respectfully agree. The driver had in fact claimed trial when first charged in the Magistrate's Court. What caused him to change his plea later might be explained on grounds which need not be gone into here. As regards the police sketch plan, the learned trial judge have his reasons for discounting its value. The plan only contained what the police sergeant thought relevant. It was not necessarily in conflict with the plaintiff's testimony, as the judge took pains to explain. In this connection I think it is also a point to be remembered that this trial judge had over the years been quite familiar with the Bentong road and that, before as well as after the trial up to delivery of judgment, he had had to pass that very spot — although no specific reference to this fact was made in his judgment. At all events, what is, for present purposes, conclusive is the fact that the learned judge rejected the first appellant's story as improbable and untrue, while giving the first respondent's evidence full credence.

I turn now to the third respondent's cross-appeal. The relevant passage of the judgment apportioning 25% liability to the second and third respondents reads as follows: —

> "I am of the opinion that the driver of the stationary lorry was not wholly to blame. There was mist around, and yet this driver of the other lorry drove round a blind corner at 35 m.p.h. I am of the opinion that that was *a bit fast in the circumstances;* probably he drove at that speed as his lorry was empty and *he thought that it would have been safe to do so in view of the little traffic at that time of night*".

It may be observed that the respondents' share of liability was, in plain terms, stated to be entirely a matter of the learned trial judge's *opinion* — as distinguished from a *finding of fact.* According to Thevannasan, giving hostile evidence, he had left Kuala Lumpur at about midnight and up to the scene of the accident no traffic had overtaken him although he had

met one or two vehicles coming from the opposite direction. Therefore, there was on this same stretch of road travelled also by the respondents' lorry, so little traffic as to be negligible. According to Thevannasan, again, there was "slight mist" where he stopped, "neither too thick nor thin". Visibility up to what distance was never disclosed: but certainly no evidence to show that 35 m.p.h. was excessive. As regards speed, 35 m.p.h. going round a bend on the open road cannot *per se* be evidence of negligence for any vehicle keeping to its own side of the road, unless the bend taken was such that a vehicle at that speed had to encroach on the path of oncoming traffic. The learned judge, quite rightly, expressed the opinion that probably the respondents' driver *thought it safe* to do so in view of the little traffic at that time. Since this driver negotiated the bend without any difficulty, it was, of course, a reasonable speed, expecting no obstruction in his own path round the bend.

With the greatest respect, therefore, I think the learned trial judge had demanded of the respondents' driver a higher standard of care than was reasonable in the circumstances. As Willmer L.J. said in *Brophy* v. *Shaw*: —[1]

"The short answer to this appeal is to remember that the defendant's duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist".

In an earlier case *Edwards* v. *Nobbs*[2] his Lordship had similarly said: —

"It is possible that the most expert driver might have done a little better. The standard, however, is not that of the perfect driver, but the driver using ordinary care and skill".

This driver could not reasonably be required to anticipate an obstruction lying directly in his path, of which there were no warning signs whatsoever. It has to be remembered at all times that an *oncoming* vehicle betrays its presence long before its arrival by the beam of its headlights. Therefore, when the road beyond the blind bend appeared to reveal no beam of any oncoming vehicle there was no need for any unusual caution. The rear lights of the appellants' stationary lorry cast *no beam behind. Rear lights do not function like headlamps.* The respondents' driver accordingly must have been taken completely by surprise to see what the learned trial judge found as a fact: that a stationary lorry was blocking its path no more than 30 feet beyond the blind left-hand bend. Could this driver then have taken any evasive action — even were he travelling at 25 m.p.h.? I think not. At 35 m.p.h. the rate of travel is approximately 52½ feet per second; at 25 m.p.h., it would be 37½ feet per second. The distance of 30 feet in this case would be covered in less than one second — not counting reaction time to translate a visual message into action. In the place of the respondents' driver, I do not think it was humanly possible, on the facts found, for any person, however skilled in driving, to avoid crashing into the stationary lorry. The principle enunciated by Lord Denning M.R. in *Kerry* v. *Carter*[3] which this court has followed in *Sepang Omnibus Sdn. Bhd.* v. *Christina Loh Soo Pang*[4] and other cases is as follows: —

"This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong".

I would accordingly dismiss the appeal and allow the third respondents' cross-appeal with costs. In the result the appellants will be liable to satisfy the whole of the first respondent's claim, with costs here and in the court below.

Ali F.J.: This is an appeal from the judgment of Suffian F.J. sitting in the High Court at Raub.

The first respondent, Pang Cheong Yow, was injured when the lorry in which he was travelling as an attendant rammed into the rear of the appellants' lorry which was stationary.

On the evidence at the trial the learned judge made the following finding of facts:

"The facts as I find them are as follows. The road was wide enough to have allowed in the ordinary way the lorry behind to pass the stationary lorry in front in safety. The lorry in front was parked on its correct side of the road. There was no reason why it should not have its lights on while so parked, and I find that it had its lights on, including the offside rear flasher. I find that there was some mist around, which somewhat reduced visibility. I find that the lorry behind was travelling at a moderate speed with its lights on when it ran into the rear of the stationary lorry."

On these findings he concluded —

"Having given all this evidence the best consideration I can give it, I find it more probable than not that the accident occurred because the first defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend."

Later in his judgment he added —

"Now as regards apportionment of blame, I am of the opinion that the driver of the stationary lorry was not wholly to blame. There was mist around, and yet the driver of the other lorry (the absent third defendant) drove round a blind corner at 35 m.p.h. I am of the opinion that that was a bit fast in the circumstances; probably he drove at that speed as his lorry was empty and he thought that it would have been safe to do so in view of the little traffic on the road at that time of the night. In the circumstances, I find that the first defendant was 75% and the third defendant 25% to blame for the accident and therefore the first and second defendants should pay 75% and the third and fourth defendants 25% of the damages and costs awarded to the plaintiff."

Both appellants and the third respondent have respectively appealed and cross-appealed against the trial court's findings on liability and its apportionment. The case for the appellants, simply stated, is that on the facts found by the trial court, judgment for the whole amount of damage should have been entered against the respondents. The case for the third respondent, on the other hand, is that if, as stated by the trial judge in his judgment, the presence of the stationary lorry near the corner had solely caused the accident then there was nothing which the second respondent could do to avoid the collision; in that context the appellants should be held solely liable

It is necessary to refer again to the passage in the judgment of the trial judge which forms the basis of the third respondent's cross-appeal. It reads —

"I find it more probable than not that the accident occurred because the first defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend."

If these words mean no more than that the presence

of the stationary lorry near the blind corner had partly caused the accident or collision, then I can find no substance in the cross-appeal. It would seem clear to me reading the judgment as a whole that the trial judge was of the view that the appellants and the respondents are to share the blame in the proportion stated. As regards his finding of liability against the respondent, I think it is impossible for the third respondent to challenge it in view of the evidence. I entirely agree with the trial judge that the second respondent was negligent in driving round the blind corner at 35 miles per hour. I would for this reason dismiss the cross-appeal with costs.

It remains for consideration whether the finding of liability against the appellants can be supported. If so, the appellants' appeal must be dismissed. If otherwise the respondents must be held solely liable for the full amount of damage awarded to the first respondent. One thing which is clear is that when the collision occurred the appellants' lorry was not in motion but was stationary. This means the act of negligence by the first appellant, if at all, was the act of parking his lorry too close to the blind corner. The question which arises is, what was his common law duty in the circumstances? Stopping or parking a vehicle on the road can by no means be an unlawful act unless, of course, it is so provided by statute. We are here concerned with the law of negligence which involves the consideration of a driver's duty to take care. On the finding of facts in this case I fail to see how the first appellant can be said to have failed in his common law duty to take care. He parked his lorry with its rear lights on and in such a manner as to leave enough space for vehicles coming from the rear to pass through safely. Does the law require him to do anything more? As pointed out by Lord Normand in *Bolton & Ors.* v. *Stone* —[5]

"It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

Was he required by law to park his lorry more than 30 feet from the corner? If so, how far away? The learned trial judge did not say how far away from the corner could be a safe distance to park the lorry. The reason is clear because it is impossible to lay down any hard and fast rule. Parking anywhere on the road undoubtedly involves some risks. But as stated by Lord Porter in *Bolton's* case, *supra*, at page 1081:

"...The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

With great respect to the learned trial judge in this case I do not agree with him that the first appellant was guilty of negligence merely because he parked his lorry too close to the corner. I take the view that he did what a reasonable driver would have done in similar circumstances.

The facts of this case are somewhat similar to the facts of *Chan Loo Khee* v. *Lai Siew San & Ors.*[6] in which a third party whose car was parked by the roadside was held by a majority judgment of the Federal Court not liable for the collision between two cars travelling in opposite directions. In that case the claim against the third party was on the basis that the presence of his car on the road had a causative effect or influence on the accident. Following the view of the common law taken by Ashworth J. in *Kelly* v. *W.R.N. Contracting Ltd. & Anor (Burke, Third Party)*[7] I held that the third party was not liable even though the presence of his car on the road had a causative effect or influence on the accident. In *Kelly's* case Ashworth J. said so in clear words on page 923 as follows:

"...There is nothing at common law which rendered Dr. Burke's conduct blameworthy in any respect. He had about two or three feet of his little Ford Anglia on the highway. The road at that place is 31 feet wide, and there was abundant room for any vehicle carefully driven to pass that car with safety. I have no doubt at all if the claim against Dr. Burke depended on common law negligence it would fail, but the position in regard to statute is somewhat different because Mr. Hytner contends there was here a breach of regulations."

He said this despite the finding of fact that Dr. Burke's car did have a causative effect or influence on the accident. But the claim before him was not based on common law negligence. It was based on a breach of regulations. So based his decision holding Dr. Burke liable or partly liable in damages is, therefore, not germane to the present case or *Chan Loo Khee's* case, *supra*. Therefore, even if Ashworth J.'s decision in holding Dr. Burke liable for breach of regulations was wrong, as was held by the Court of Appeal in *Coote and Another* v. *Stone*,[8] his view on the common law remains unchallenged. *Coote's* case is also a decision on a claim for breach of regulations and not for negligence although it was for negligence at the start. Nowhere in the judgment of that case can I find any criticism of Ashworth J.'s view of the common law. Accordingly, so far as the case under review involves a claim based on negligence it must fail because on the law as I find it the first appellant cannot be held guilty of negligence for having parked his lorry near the blind corner. I would for that reason allow the appellants' appeal with costs.

Accordingly, the appellants' appeal is allowed and the third respondents' cross-appeal dismissed with costs. This means that the first respondent succeeds in his claim against the second and third respondents but fails as against the appellants. Costs as between the parties in the action shall be in terms of the *Bullock* order.

Gill F.J.: I agree with my brother Ali, for the reasons which he has stated so clearly, that this appeal be allowed and that the third respondent's cross-appeal be dismissed. I also agree with his proposed order as regards costs.

As I said in the case of *Chan Loo Khee* v. *Lai Siew San & Ors.*, which has been referred to by my brother Ali in his judgment, I have not been able to find a single decided case where the owner or driver of a vehicle leaving it on the highway with its lights on has been held liable in negligence.

Each case, of course, must depend upon its own facts. But in view of the findings of fact made by the learned trial judge in this case, I do not see how the appellants can be held to blame in any way for the accident. It is to be observed that the second respondent pleaded guilty to a charge of dangerous driving

and he failed to appear at the trial of the action to give evidence as to why the accident happened.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Murphy & Dunbar; Chooi & Co.*

OVERSEAS UNION FINANCE LTD. v. GOVINDASAMY

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.JJ.)

March 27, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 91 of 1972]

Housing Developers — Developers also licensed moneylenders — Sale of house — Balance of purchase price raised by loan from developers/moneylenders — Charge of land to secure loan — Whether moneylending transaction — Moneylenders Ordinance, 1951.

The appellants were housing developers as well as licensed moneylenders. In the course of their business as such developers, they sold to the respondent a piece of land and a house thereon for $16,000. The respondent made a down-payment of $2,500 and agreed to pay the balance by monthly instalments inclusive of interest. A transfer of the property was executed in favour of the respondents, who in turn executed a charge of the property in favour of the appellants. The respondent having failed to pay the instalments, the appellants applied for an order for the sale of the property. The application was dismissed on the ground that the appellants, being moneylenders had not complied with the Moneylenders Ordinance, 1951 in that no memorandum of the contract between the parties was executed, no authenticated copy supplied to the respondent and no statement of account was produced.

Held, allowing the appeal: on the evidence there was no loan at all between the appellants and the respondent. The transaction in this case was not entered into by the appellants in the course of their business as moneylenders.

Cases referred to:-

(1) *Overseas Union Finance Ltd.* v. *Lim Joo Chung* [1971] 2 M.L.J. 124.

(2) *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.* [1971] 2 M.L.J. 251.

(3) *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* 159 L.T. 332.

(4) *Rabone* v. *Deane* (1915) 20 C.L.R. 636.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

S. A. Raj for the respondent.

Gill F.J. (delivering judgment of the court): The appellants are housing developers as well as licensed moneylenders. In the course of their business as such developers, they sold to the respondent a piece of land with a house thereon in a housing area known as Puchong Garden for a sum of $16,000. The respondent made a down payment of $2,500 and agreed to pay the balance of $13,500 by monthly instalments inclusive of interest of $199.80. Simultaneously with the appellants executing a transfer of the property in favour of the respondent, the respondent executed a charge over the property in favour of the appellants to secure the balance of the purchase price. Both the transfer and the charge were presented to the Land Office for registration on September 18, 1968.

The respondent having failed to pay the instalments as and when they fell due under the charge, the appellants on October 5, 1971 took out an Originating Summons to apply for an order that the land, the subject matter of the charge, be sold by public auction for the recovery of the sum of $13,165.95 then due under the charge. Their application, when it came up for hearing in due course, was dismissed.

Against the dismissal of their application the appellants appealed to this court.

The application in the court below was opposed on the ground that the appellants, being licensed moneylenders, had not complied with section 16(1) of the Moneylenders Ordinance, 1951 in that no memorandum of the contract between the parties was executed with a delivery of an authenticated copy thereof to the respondent, and that no statement of account as required by section 21(1) of the Ordinance had been produced. It was also contended that section 19 of the Ordinance as regards the obligation to supply information as to state of loan and copies of documents relating thereto had not been complied with, and it was further contended that the demand made under the loan was defective by reason of the non-compliance with sections 19 and 21 of the Ordinance. In support of these contentions, counsel for the respondent relied on the case of *Overseas Union Finance Ltd.* v. *Lim Joo Chong.*(1)

The case for the appellants briefly was that the transaction between the parties was not one of moneylending and therefore not subject to the moneylenders Ordinance. For this they relied on the case of *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor.*(2).

In dismissing the application, the learned trial judge took the view that the fact that there was a loan was evident from the memorandum of charge itself which spoke of "the repayment on demand of the sum of $13,500 *lent*". In other words, his Lordship was greatly influenced by the word "lent". The conclusion at which he arrived was stated in his judgment as follows:

"In the circumstances of this particular case it is also evident that the applicant was taking a mortgage on loan as a business. Essentially the applicant was carrying on business of moneylending. Even though the applicant company's memorandum of association has set out numerous objects for which the company has been established, it is apparent that the company was carrying on activities particularly concerned with the lending of money. It was plainly within the contemplation of the parties that the respondent was to execute a mortgage to secure repayment of the loan made by the applicant in the course of its business. The transaction was therefore essentially a moneylending transaction, and, as such, there must be strict compliance with the provisions of the Moneylenders Ordinance."

At the hearing of the appeal before us the arguments of counsel for the appellants proceeded on these lines. This was not a moneylending transaction. No money ever passed from the appellants to the respondent. The Moneylenders Ordinance itself shows its restricted application. Section 15 of the Ordinance speaks of "a contract for the repayment of *money lent*". Section 16(1) also speaks of "a contract for